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Interminable Parade Rest: The Impossibility of Establishing Service Connection in Veterans Disability Compensation Claims When Records Are Lost or Destroyed

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THE IMPOSSIBILITY OF ESTABLISHING SERVICE CONNECTION IN VETERANS DISABILITY COMPENSATION CLAIMS WHEN RECORDS ARE LOST OR DESTROYED

Jessica Lynn Wherry†

INTRODUCTION

Jonathan McMullan[1] served on active duty in the U. S. Army in the mid- to late-1970s. He was one of many who remained stateside during the Vietnam War. After an honorable discharge, he attempted to reenlist but was denied because of a medical diagnosis of hypertension at the time of discharge. That diagnosis would have been included in his service medical records as part of his discharge processing. In the early 1990s, McMullan filed a claim with the Department of Veterans Affairs (VA) for service-connected disability compensation due to the hypertension. VA sent McMullan three letters while developing his claim. In its initial response to his claim, VA indicated it was waiting for evidence before deciding his claim and notified McMullan that it would obtain the evidence from his service

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[1] Parade rest is the military term for stand by and wait for the next command. DEP'T OF NAVY, DRILL AND CEREMONIES MANUAL art. 2.1 (2013), https://www.usna.edu/Commandant/Directives/Instructions/5000-5999/COMDTMIDNINST_5060.1_with_CH1_and_CH2_Drill_and_Ceremonies_Manual.pdf [https://perma.cc/T2TC-K4A5] (requiring "[s]ilence and immobility"). This is my client's story; his name has been changed. Unless otherwise indicated, all references to documents are from McMullan's VA claims file (C-file). I received an electronic C-file in July 2015 including documents through March 2, 2015. Page references are to the 603-page PDF I received from VA Records Management Center.

medical records.[2] The second letter updated McMullan on the claims process and notified him that service medical records were required.[3] The third letter provided McMullan with a list of requested evidence needed to take further action on his claim.[4] McMullan requested his service medical records in October 1991, but never received them.[5]

Less than a year later, VA decided McMullan's claim: denied.[6] It did not consider McMullan's service medical records, nor did it consider any other evidence other than the claim form. The decision letter indicated that VA needed a list of information before taking final action, including medical evidence of hypertension at the time of discharge.[7] The letter explained that VA never received that requested evidence and advised McMullan to submit the evidence at any time.[8]

McMullan and VA continued to try to obtain his service medical records, but to no avail. In response to repeated requests, the National Personnel Records Center (NPRC)[9] indicated that it was "unable to locate a military service record

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[2] Letter from Veterans Admin., Balt. Reg'l Office, C-file at 199 (Mar. 15, 1991) (on file with author) ("claim awaits evidence or information which we are obtaining from . . . service medical records").

[3] Letter from Veterans Admin., Balt. Reg'l Office, C-file at 200 (Mar. 18, 1991) (on file with author) ("We have requested your service medical records from the service department, but if you have any service records in your possession, please send us a copy. We will not deny your claim just because you do not have copies of your service records in your possession. Please submit the requested evidence as soon as possible. If we do not receive this evidence within one year from the date of this letter, we cannot pay the benefit to which you may be entitled earlier than the date we do receive it.").

[4] Letter from Dep't of Veterans Affairs, Balt. Reg'l Office, C-file at 204–05 (Sept. 21, 1991) (on file with author) (VA asked McMullan for "[m]edical evidence to indicate [his] hypertension ha[d] existed since [his] discharge from service." There was also a statement that VA was "trying to obtain [McMullan's] service medical records to substantiate [his] claim.").

[5] McMullan Request Pertaining to Medical Records, C-file at 216–17 (Oct. 3, 1991) (on file with author) (In box 4 asking for purpose of the documents request, McMullan wrote "for VA benefits service connection hypertension.").

[6] Letter from Veterans Affairs Adjudication Officer, Balt. Reg'l Office, C-file at 220 (May 21, 1992) (on file with author) [hereinafter Letter from Adjudication Officer].

[7] *Id.* Medical evidence is one of the typical types of evidence required to establish a service-connected disability claim. *See Evidence Requirements*, U.S. DEP'T OF VETERANS AFF., https://www.benefits.va.gov/COMPENSATION/evidence.asp [https://perma.cc/LG76-K2CP] (listing the evidence requirements and procedures for filing a compensation claim with the VA); *see also infra* Section I.A (listing elements of service connection).

[8] Letter from Adjudication Officer, *supra* note 6.

[9] The NPRC is part of the National Archives and Records Administration. *Military Personnel Records*, NAT'L ARCHIVES, https://www.archives.gov/st-louis/military-personnel [https://perma.cc/9E6V-5KQL].

at this time."[10] That was on February 5, 1993. As often happens, McMullan gave up his claim at that time.[11]

Problems with VA have been widely reported in the news and have perhaps contributed to the growth of law school veterans clinics[12] and veterans law scholarship.[13] By statute,

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[10] Reply to Request for Info. from Nat'l Pers. Records Ctr., C-file at 223 (Feb. 5, 1993) (on file with author).

[11] McMullan inspired this article. I represent him in a pro bono case through the Veterans Legal Assistance Project, Homeless Persons Representation Project in Baltimore, Maryland. I wrote this article in an effort to expose the contradictions in how claims are treated when records are lost or destroyed. The information about McMullan's claim is accurate, though what I've mentioned here is an incomplete picture. My client has filed a number of claims seeking disability benefits for a variety of other illnesses and injuries, including exposure to Agent Orange and posttraumatic stress disorder. In an effort to provide a clean narrative, my focus here is on his original claim of hypertension.

[12] *See* Karen Sloan, *Law Clinics Answer the Call; Veterans Finding Allies in Dealing with the VA and More*, NAT'L L.J. (July 6, 2015, 12:00 AM), https://www.law.com/nationallawjournal/almID/1202731282103/ [https://perma.cc/5L9S-WAVB] ("[T]he number of law school clinics and pro bono projects addressing veterans' unmet legal needs has exploded." In 2015, there were "approximately [fifty] schools operat[ing] clinics or pro bono programs.").

[13] Those problems and others are not repeated here in the interest of focusing in on a narrow issue of how claims are evaluated when service medical records are lost or destroyed. Still, that VA has rampant and at least somewhat ongoing problems likely has some relevance to the specific problem discussed here. *See* Luanne Rife, *Veterans Injured by Service Wait Years for Compensation Hearings*, ROANOKE TIMES (Feb. 19, 2017), http://www.roanoke.com/news/veterans-injured-by-service-wait-years-for-compensation-hearings/article_133660ff-479c-5234-b86e-f98ac7fecd52.html [https://perma.cc/BFQ4-9PL6] ("470,000 veterans [are] caught in the bureaucratic purgatory of the VA's benefits appeals process. On average, a veteran who has appealed will wait about five years for a decision, as his case gets passed back and forth between the regional office and the appeals board. About half the time, if the case goes to the appeals board, it gets kicked back to the regional office for more information."); *see also* Debra A. Draper, Dir. of Healthcare at the U.S. Gov't Accountability Office, Testimony Before the Comm. on Veteran's Affairs, House of Representatives, VA Healthcare: Actions Needed to Improve Access to Primary Care for Newly Enrolled Veterans (Apr. 19, 2016), http://www.gao.gov/assets/680/676679.pdf [https://perma.cc/8KEZ-FWNR]; Dave Boyer, *VA Still Plagued by Problems Two Years After Scandal*, WASH. TIMES (Apr. 3, 2016), http://www.washingtontimes.com/news/2016/apr/3/va-still-plagued-by-problems-two-years-after-scand/ [https://perma.cc/PUC9-2BE3]. To be fair, there have been efforts to respond to the challenges. VA was a priority in the waning Obama administration. *See, e.g.*, Press Release, U.S. Dep't of Veterans Affairs Office of Pub. & Intergovernmental Affairs, Obama Administration Announces Nearly 50-Percent Decline in Veteran Homelessness (Aug. 1, 2016), http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2805 [https://perma.cc/KX3T-V5TW]; Allison Hickey, *VA Claims Backlog now Under 100,000—Lowest in Department History*, U.S. DEP'T OF VETERANS AFF.: VANTAGE POINT (Aug. 24, 2015, 3:00 PM), http://www.blogs.va.gov/VAntage/22436/va-claims-backlog-now-under-100000-lowest-in-department-history/ [https://perma.cc/UG4Z-BHPW]. Even though the claims backlog has lessened, that does not mean more accuracy in claims decisions. *See, e.g.*, VETERANS AFFAIRS OFFICE OF INSPECTOR GEN., OFFICE OF AUDITS & EVALUATIONS, REVIEW OF SPECIAL MONTHLY COMPENSATION HOUSEBOUND BENEFITS ii (2016), http://www.va.gov/oig/pubs/VAOIG-15-02707-277.pdf [https://perma.cc/2KEB-QKSZ] (finding 18 percent error rate for cases involving veterans entitled to statutory benefits and 51 percent error rate for paying housebound rate of compensation). For examples of veterans law scholarship related to the claims backlog and other VA inefficiencies, see Alexandra S. Haar, Note, *Sweet Dreams Aren't Made of These: How the VA's Disability Compensation Program Leaves Veterans Alone in the Nightmare of Posttraumatic Stress Disorder*, 88 WASH. U.

veterans are eligible for disability compensation benefits for illness or injury connected to the veteran's service in the armed forces.[14] The process of seeking benefits is intended to be non-adversarial, requiring VA to assist veterans in developing their claims.[15] VA's nagging problems, including poor management and a lack of accountability, are unfortunately not limited to veterans receiving disability benefits, but extend to veterans who never make it past the claim stage.[16]

Typically, service medical records are used to establish service connection in disability compensation claims.[17] When those records are unobtainable, there are alternative sources of medical or lay evidence that can be used to establish service connection.[18] When service medical records are lost or destroyed and there is no other contemporaneous medical evidence, however, the veteran likely suffers an absolute bar to receiving a favorable decision about service connection. Any decision made without service medical records is necessarily based on a lack of evidence rather than an evaluation of the evidence.

Lost records are a well-known and widespread challenge to veterans seeking disability compensation. The lack of service medical records results in decisions framed as insufficient to establish service connection, but the practical reality is that these decisions treat a lack of evidence as sufficient for a negative decision. In cases where a veteran's records are lost or destroyed due to no fault of the veteran, the lack of evidence typically results in a claim's denial or delay on the basis that

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L. REV. 969, 986 (2011); Daniel L. Nagin, *Goals vs. Deadlines: Notes on the VA Disability Claims Backlog*, 10 U. MASS. L. REV. 50, 50 (2015); Stacey-Rae Simcox, *Lightening the VA's Rucksack: A Proposal for Higher Education Medical-Legal Partnerships to Assist the VA in efficiently and Accurately Granting Veterans Disability Compensation*, 25 CORNELL J.L. & PUB. POL'Y 141, 145 (2015).

[14] 38 U.S.C. §§ 1110, 1131 (2012).

[15] *Id.* § 5103A (explaining that VA is supposed to assist veterans in developing their claims).

[16] For example, McMullan's time in the claim stage has lasted nearly four decades due to his lack of service medical records. Other veterans never make it past the claim stage due to how VA treats certain types of discharges. *See* VETERANS LEGAL CLINIC, UNDERSERVED: HOW THE VA WRONGLY EXCLUDES VETERANS WITH BAD PAPER 2 (2016), https://www.swords-to-plowshares.org/wp-content/uploads/Underserved.pdf [https://perma.cc/29GX-AJ7S] ("Only 1% of service members discharged in 2011 are barred from VA services due to Congress' criteria. VA regulations cause the exclusion of an additional 5.5% of all service members.").

[17] *See Evidence Requirements*, *supra* note 7.

[18] *M21-1, Part III, Subpart iii, Chapter 2, Section E—Unique Claims and Situations That Require Special Handling*, U.S. DEP'T OF VETERANS AFF. (last updated 2017), https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000014159/M21-1,-Part-III,-Subpart-iii,-Chapter-2,-Section-E%E2%80%94-Unique-Claims-and-Situations-That-Require-Special-Handling ("III.iii.2.E.2.b. Types of Evidence VA May Use To Supplement or as a Substitute for STRs").

there is no evidence supporting the service connection.[19] A 1973 fire at the NPRC in St. Louis, Missouri (1973 fire) "destroyed approximately 16–18 million" records.[20] Even in cases involving the 1973 fire, the United States Court of Appeals for the Federal Circuit has rejected an argument in favor of presumptive service connection and allowed an absence of records to justify a negative rating decision.[21]

Unfortunately, the lost records problem extends beyond the disastrous 1973 fire and McMullan is one among thousands of veterans impacted by this problem. Without these military records, a veteran faces an uphill battle when "the burden unfairly shifts to the veteran to use his own resources to obtain alternative evidence."[22] And often, the burden creates an impossible hurdle; "veterans are either denied the benefits sought or the adjudication of the claim(s) is significantly delayed."[23] These unjust results and delays affect "literally thousands of veterans."[24]

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[19] *See Wading Through Warehouses of Paper: The Challenges of Transitioning Veterans Records to Paperless Technology*, *Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 112 Cong. 35 (2012) (prepared statement of Michael R. Viterna, President, National Association of Veterans Advocates) [hereinafter *Wading Through Warehouses of Paper*] https://www.gpo.gov/fdsys/pkg/CHRG-112hhrg78772/pdf/CHRG-112hhrg78772.pdf [https://perma.cc/7NSB-5SL6] ("Veterans have earned certain benefits from their military service and a paper driven system of records and a lack of service department records are impediments, if not preclusive, to the receipt of those benefits."); *id.* at 2 (opening statement of Hon. Jon Runyan, Chairman, Subcommittee on Disability Assistance and Memorial Affairs) ("Often, a single record or notation can be the difference in whether a veteran's disability claim is granted or denied. This is why we must work together to ensure that no records are lost, overlooked or otherwise unable to be associated with an individual disability claim.").

[20] *Veterans' FAQ*, NAT'L ARCHIVES, https://www.archives.gov/veterans/faq.html#9 [https://perma.cc/4C82-PHQV] ("Archival Records, FAQ . . . Was my record destroyed in the 1973 Fire? If so, what information is available to me?").

[21] *See, e.g.*, Cromer v. Nicholson, 455 F.3d 1346, 1348 (Fed. Cir. 2006) (describing the appeal to the Veterans Court as "a single issue, arguing that the Veterans Court should have applied an 'adverse presumption' favoring service connection in circumstances where medical records are lost or destroyed while in possession of the government" (quoting Cromer v. Nicholson, 19 Vet. App. 215, 216 (2005))). The Court of Veterans Appeals has similarly ruled. *See, e.g.*, Gregory v. Brown, 8 Vet. App. 563, 569 (1996) ("[T]here are no service medical records (SMRs) to show an in-service rectal bleeding problem because the SMRs were lost or destroyed . . . ."); Willis v. Derwinski, 1 Vet. App. 66, 70 (1991) ("[S]ince the VA lost the veteran's service records, there was no way for the VA psychiatrist to confirm that the diagnosis of personality disorder had been made or why it was made . . . .").

[22] *Wading Through Warehouses of Paper*, *supra* note 19, at 40 (prepared statement of Michael R. Viterna, President, National Association of Veterans Advocates).

[23] *Id.*

[24] *Id.* at 42 (prepared statement of Jeffrey Hall, Assistant National Legislative Director, Disabled American Veterans); *see also id.* at 39 (prepared statement of Michael R. Viterna, President, National Association of Veterans Advocates) ("We have learned from the Vietnam Veterans of America, for instance, that in 3,956 issues remanded for veterans they represented between 2003 and 2001, military service records were missing in 954 issues.").

Despite this recognition of the negative consequences on veterans when their records are lost or destroyed, neither VA nor Congress has taken steps to relax the evidentiary burden on veterans.[25] The time has come to respond to this ongoing problem by creating a statutory and regulatory scheme enforceable by courts that is specifically designed to give the veteran the benefit of the doubt in the case of lost records.

This article proceeds in Part I by explaining the service-connected disability compensation system with a particular focus on the element of service connection. Part II illustrates the results of the current approach that treats lack of service medical records as evidence of no service connection, discusses how the Court of Appeals for the Federal Circuit has ruled in cases of no records, and addresses the impact of those cases on McMullan's pending claim. Part III offers administrative and statutory remedies in the form of relaxed evidentiary standards. The remedies are applied to McMullan's case to illustrate how the relaxed evidentiary standards would work in practice. The article concludes with an update on McMullan's case and a reinforced call to action.

I. SERVICE-CONNECTED DISABILITY COMPENSATION

Service-connected disability compensation is just one of many benefits veterans may be entitled to due to their military service.[26] Understanding the eligibility and entitlement criteria for disability compensation is a critical step to reforming it. "Disability Compensation is a monthly tax-free [monetary] benefit paid to Veterans who are . . . disabled because of injuries or diseases that were incurred in or aggravated during active duty, active duty for training, or inactive duty training."[27] Disability

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[25] *See id.* at 31 (prepared statement of Hon. Jerry McNerney, Ranking Democratic Member) ("Congress hears complaints of lost, missing, destroyed or unassociated files all too often. Information affecting a Veteran's claim should be better protected by those charged with its care. . . . Veterans and their families should not be burdened with the responsibility of re-creating lost files or providing multiple copies of records that once were in the DoD and VA's possession.").

[26] *See Veterans Benefits Administration*, U.S. DEP'T OF VETERANS AFF., https://www.benefits.va.gov/benefits/ [https://perma.cc/9FGR-E6RU] (Based on program-specific eligibility criteria, veterans may be entitled to a wide-range of benefits including the GI Bill, pension, and home loan incentives.).

[27] *Disability Compensation*, U.S. DEP'T OF VETERANS AFF., http://www.benefits.va.gov/COMPENSATION/types-disability.asp [https://perma.cc/SCG4-HA8S]; *see also Compensation*, U.S. DEP'T OF VETERANS AFF., http://www.benefits.va.gov/compensation/ [https://perma.cc/584P-G2EN] ("Compensation may also be paid for post-service disabilities that are considered related or secondary to disabilities occurring in service and for disabilities presumed to be related to circumstances of military service, even though they may arise after service. Generally, the degrees of disability specified are also

compensation affects millions of veterans[28] and has been the subject of many of the negative reports about VA in recent years, especially delayed claims processing.[29]

A. Elements of Service Connection

Disability compensation is awarded only when there is a service connection to the veteran's current disability or disease.[30] Service connection "means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein."[31] There are four types of service connection: direct service connection, service connection by aggravation, secondary service connection, and presumptive service connection.[32] First, an in-service event or condition can establish direct service connection.[33] Second, by showing that an in-service event or condition aggravated an existing disability, a disability that existed at the time of entering service, a veteran can establish service connection by aggravation.[34] Third, a showing that a disability is "proximately due to or chronically aggravated by a service connected" disease or disability can establish a secondary

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designed to compensate for considerable loss of working time from exacerbations or illnesses.").

[28] Not including service-connected death benefit recipients, VA paid $64.71 billion in compensation benefits to 4,356,443 veterans in FY 2016. VETERANS BENEFITS ADMIN., ANNUAL BENEFITS REPORT: FISCAL YEAR 2016 8 (2017), https://www.benefits.va.gov/REPORTS/abr/ABR-All_Sections_FY16_06292017.pdf [https:// perma.cc/NPS8-DLSB] (VA reported approximately 4.75 million compensation and service-connected death benefit recipients for a total of $71.03 billion paid in compensation benefits in FY 2016).

[29] *See, e.g.*, Rife, *supra* note 13. Since the reports about the egregious number of pending and backlogged claims, VA has managed to respond by decreasing the numbers of pending claims as well as increasing the quality of claims processing. According to the VA website anyway. *Detailed Claims Data*, U.S. DEP'T OF VETERANS AFF., http://benefits.va.gov/REPORTS/detailed_claims_data.asp [https://perma.cc/2LW6-6F99] ("We can see that VBA employees are completing more compensation claims than ever before. More than three million claims were processed in the past three fiscal years, three times the amount completed in 2000. Quality is also increasing as quality ratings were up 4 percent in the past year, reversing a four-year decline.").

[30] 38 U.S.C. § 1110 (2012).

[31] 38 C.F.R. § 3.303(a) (2017).

[32] Jeff Gold & Michael Stone, Presentation at the Veteran Benefits Training: Veterans' Legal Assistance Project (VLAP) 23–44 (Jan. 30, 2014) (on file with author).

[33] The veteran is responsible "to present and support a claim." 38 U.S.C. § 5107(a). But the veteran's burden of proof is "remarkably low when compared to other legal burdens." Simcox, *supra* note 13, at 145; *see also supra* Section I.B.2.

[34] 38 U.S.C. § 1153; 38 C.F.R. § 3.306(a). For service connection by aggravation, the veteran must show increase in disability during service, "unless there is a specific finding that the increase in disability is due to the natural progress of the disease." 38 U.S.C. § 1153; 38 C.F.R. § 3.306(a).

service connection.[35] Fourth, presumptive service connection exists without any specific in-service event even when no evidence is available.[36] Service connection is wide-reaching, including injuries incurred while on duty and events experienced outside of duty but while in an active duty status.[37]

By way of illustration, the VA website offers two examples. In the first example, an Army Reservist on weekend drill "injures her knee while participating in a physical training class."[38] Even though the event occurred over the weekend, since it took place while she was on active duty, it counts as service connected.[39] In the second example, an honorably discharged sailor fell from a bunk while on active duty.[40] He injured his back as a result of a fall, and since he fell while he was on active duty, it was a service-connected injury.[41]

The elements for eligibility of a service-connected disability claim are not defined by statute, but rather have been defined by the United States Court of Appeals for the Federal Circuit and the United States Court of Appeals for Veterans Claims.[42] For purposes of understanding the evidentiary burden on a veteran seeking service-connected disability compensation, there are three eligibility elements to a claim[43]: (1) current disability or disease, (2) in-service event of disability or disease, and (3) nexus between service and the disability or disease.[44] The

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[35] Gold & Stone, *supra* note 32, at 40; *see also* Allen v. Brown, 7 Vet. App. 439, 448 (1995); 38 C.F.R. § 3.310(a)–(b).

[36] *See* 38 C.F.R. §§ 3.307–09; *see also infra* Section I.B.3.

[37] *Disability Compensation*, *supra* note 27.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Dingess v. Nicholson, 19 Vet. App. 473, 484 (2006), *aff'd*, 226 F. App'x 1004 (Fed. Cir. 2007), *aff'd sub nom.* Hartman v. Nicholson, 483 F.3d 1311 (Fed. Cir. 2007); *see also* Simcox, *supra* note 13, at 145 ("The requirements for establishing entitlement to receive benefits for disabilities incurred in service are found in the Court of Appeals for Veterans Claims' 1995 decision in *Caluza v. Brown*. First, the veteran must be able to establish that he is suffering from a current disability . . . . Second, the veteran must establish that he suffered an event during his active service that caused or aggravated his current condition . . . . Finally, the veteran must provide evidence that his current disability is in fact caused by that in-service event." (footnotes omitted)).

[43] There are other threshold criteria to establishing a claim, but those elements are the not the focus of most service-connected disability claims. For example, veteran status, and conditions of service. *See* 38 U.S.C. § 101(2) (2012) (defining veteran).

[44] Simcox, *supra* note 13, at 145–46; *see also Dingess*, 19 Vet. App. at 484. ("Although the term 'claim' is not defined in title 38, U.S. Code, the caselaw of the Federal Circuit and this Court has established that a service-connection claim that provides for disability-compensation benefits under 38 U.S.C. §§ 1110 (war time) or 1131 (peacetime) consists of the following five elements: '(1) [V]eteran status; (2) existence of a disability; (3) a connection between the veteran's service and the disability; (4) degree of disability; and (5) effective date of the disability.'" (alteration in original) (emphasis omitted) (quoting Collaro v. West, 136 F.3d 1304, 1308 (Fed. Cir. 1998) (citing Fenderson v. West, 12 Vet.

VA website's version of the requisite elements for disability compensation highlights the evidentiary burden on the veteran.[45] To establish service connection, there must be "[m]edical evidence of a current physical or mental disability" as well as "[e]vidence of a relationship between [the] disability and an injury, disease, or event in military service."[46] Specifically, "[m]edical records or medical opinions are required to establish this relationship."[47] VA further notes that it "may conclude that certain current disabilities were caused by service, even if there is no specific evidence proving this in [a] particular claim."[48] Some of these presumed disabilities are related to exposure to gas or herbicide in designated geographical areas.[49] Both the veteran and VA are responsible for developing a service-connected disability compensation claim, and there are a number of unique duties and evidentiary burdens within the service-connected disability compensation system.[50]

B. Duties and Evidentiary Burdens

Federal statute defines the veteran's responsibility in seeking a service-connected disability compensation claim: "Except as otherwise provided by law, a [veteran] has the responsibility to present and support a claim for benefits . . . ."[51] Under the Veterans Claims Assistance Act of 2000, VA is obligated to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit."[52] This obligation is known as VA's duty to

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App. 119, 125 (1999))). The fourth and fifth elements as identified here are not really about eligibility to disability compensation, but rather how to assess the disability once the three eligibility criteria are satisfied.

[45] *Disability Compensation*, *supra* note 27.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *See* discussion *infra* Section I.B.

[51] 38 U.S.C. § 5107(a) (2012).

[52] Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, § 3(a), 114 Stat. 2096, 2097 (codified as amended at 38 U.S.C. § 5103A). Perhaps not surprisingly, there is no one place military records are kept. The NPRC explains that "[t]he Official Military Personnel Files (OMPF) . . . are administrative records containing information about the subject's military service history. Many OMPFs contain both personnel and former active duty health records, but the service branches discontinued retiring the health record portion to the NPRC in the 1990s." *Veterans' Medical and Health Records*, NAT'L ARCHIVES, https://www.archives.gov/veterans/military-service-records/medical-records.html [https://perma.cc/ESW6-3C8T]. There was a period of time when all services retired health records with VA, but that stopped in 2014. *Id.* The National Archives has a chart on its website to help determine where a medical record is housed, based on branch of service, status of service termination, and date. *Id.*

assist. By regulation, a veteran's claim must be evaluated "on the basis of the places, types and circumstances of his service as shown by service records, the official history of each organization in which he served, his medical records and all pertinent medical and lay evidence."[53] Furthermore, and consistent with this duty to assist, a veteran's claim must be fully developed before VA makes a decision.[54]

1. VA's Duty to Assist in Obtaining Records

Typically, medical records are part of the basis for establishing a claim for service-connected disability compensation, and service medical records are the standard source of evidence to establish an in-service event or condition.[55] In addition to a medical opinion connecting a veteran's current condition to the in-service event, service medical records can satisfy the second and third elements of a service-connected disability claim: the event or incident that gave rise to a disability or disease and the nexus between service and the disability or disease. Although there is no statutory requirement that service medical records are provided in support of these two elements, VA does require medical records or medical opinions to show the relationship between service and disability or disease.[56] These records can be difficult to obtain from the civilian healthcare sector, as many healthcare providers are unable or unwilling to opine as to a nexus between a service disability that may have occurred decades ago, and a current disability.[57] VA recognizes the importance of service records, noting: "Service records are critical to determining a claimant's entitlement to VA benefits."[58]

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[53] 38 C.F.R. § 3.303(a) (2017).

[54] 38 U.S.C. § 7104(a) ("Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation."); McGee v. Peake, 511 F.3d 1352, 1357 (Fed. Cir. 2008) ("VA is required to assist the veteran claimant with fully developing a record before making a decision on the veteran's claim. This fully developed record then forms the basis of a Board decision.").

[55] *See Evidence Requirements*, *supra* note 7.

[56] *Disability Compensation*, *supra* note 27.

[57] *See* James D. Ridgway, *Lessons the Veterans Benefits System Must Learn on Gathering Expert Witness Evidence*, 18 FED. CIR. B.J. 405, 423 (2009) ("[T]he fundamental problem with private medical opinions is that they tend to lack detail because the doctors are not aware of the relevant legal standards or of all the information that should be included.").

[58] *M21-1, Part III, Subpart iii, Chapter 2, Section A—General Information on Service Records*, U.S. DEP'T OF VETERANS AFF. (last updated 2013), https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000014117/M21-1-Part-III-Subpart-ii-Chapter-2-Section-A-Department-of-Veterans-Affairs-VA-Benefit-Programs?query=M21-1,%20Part%20III,%20Subpart%20ii,%20Chapter%202,%20Section%20A [https://perma.cc/687Y-B6LT].

Given the uniquely pro-veteran adjudication scheme, Congress requires VA to help veterans in obtaining relevant records.[59] This "duty to assist begins when VA receives a complete or substantially complete application."[60] This duty extends to records "not in the custody of a Federal department or agency"[61] as well as those "in the custody of a Federal department or agency."[62] For example, in a disability compensation claim, VA is obligated to obtain the veteran's service medical records, relevant medical records from VA Medical Centers, and any private medical records as identified by the veteran.[63] The veteran "must provide enough information to identify and locate the existing records."[64]

This duty to assist is not boundless. VA's efforts are exhausted "if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile."[65] When records are not found, VA has a duty to document the unavailability, notify the veteran of which records were unobtainable, explain what VA did to try to get the records, and explain what further action (if any) VA will take.[66] This further action may include deciding the claim on the incomplete record "unless the [veteran] submits the records VA was unable to obtain."[67] VA is also obligated to notify the veteran that he or she "is ultimately responsible for providing the evidence."[68]

In accordance with the statutory limit on VA's duty to assist, VA's manual of procedures for administrating compensation benefits, known as M21-1 Adjudication Procedures Manual (M21-1 Manual), discourages claims processors from sending repeated requests to NPRC after receiving a negative response.[69] This procedure, therefore, sets a limit on the scope of VA's duty to assist in efforts to obtain service medical records. The M21-1 Manual notes that if NPRC

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[59] *See infra* notes 61–65 and accompanying text.

[60] 38 C.F.R. § 21.33(a) (2017); *see also* 38 U.S.C. § 5103A (2012).

[61] 38 C.F.R. § 21.33(b). For example, VA must make "reasonable efforts to obtain relevant records" from "[c]urrent or former employers" and records from "[p]rivate medical care providers." *Id.*; *see also* 38 C.F.R. § 21.1032 (b)(1).

[62] 38 C.F.R. § 21.33(c).

[63] *Id.* § 21.33(b)–(c).

[64] *Id.* § 21.33(c)(3).

[65] *Id.* § 21.33(c)(2). In the case where VA determines it is unable to obtain records, VA then has the duty to notify the veteran and, among other required information, explain "the efforts VA made to obtain the records." *Id.* § 21.33(e)(4); *see* 38 U.S.C. §§ 5102(b), 5103(a), 5103A.

[66] 38 C.F.R. § 3.159(e)(1)(i)–(iii).

[67] *Id.* § 3.159(e)(iii).

[68] *Id.* § 3.159(e)(iv); *see also* 38 U.S.C. § 5103A(b)(2).

[69] *M21-1, Part III, Subpart iii, Chapter 2, Section A—General Information on Service Records*, *supra* note 58.

eventually locates the record—"which rarely occurs"—NPRC will send the record to the appropriate VA office.[70] The M21-1 Manual discourages repeated requests to NPRC because those subsequent requests only increase the workload at NPRC and detract from the activities of those who are attempting to locate records that do, indeed, exist.[71]

By its original design, VA's service-connected disability compensation process was an internal program that considered and awarded disability claims.[72] The compensation system existed "completely insulated from judicial review."[73] The system "was not designed to decide claims subject to federal court review and the growing body of court-made law that exists today."[74] The Federal Circuit has recognized the pro-claimant nature of the duty to assist as it relates to the statutory requirement for fully developed claims before the Board of Veterans' Appeals (BVA).[75] The court explained that BVA is obligated "to 'fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits.'"[76] Consistent with the obligation to develop the claim is the implicit requirement that BVA must have the full scope of evidence to make an accurate decision.[77]

2. A Veteran's "As Likely As Not" Burden of Proof

VA adjudicates claims for service-connected disability compensation within a non-adversarial process implemented by VA regional offices. Critically, within this pro-veteran adjudication system, the evidentiary standard gives the "benefit of the doubt" to the veteran.[78] Consistent with the statutory benefit of the doubt given to the veteran, a veteran "need only

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[70] *Id.*

[71] *Id.*

[72] Daniel L. Nagin, *The Credibility Trap: Notes on a VA Evidentiary Standard*, 45 U. MEM. L. REV. 887, 888 (2015).

[73] *Id.*

[74] *Id.*

[75] McGee v. Peake, 511 F.3d 1352, 1357 (Fed. Cir. 2008).

[76] *Id.* (quoting H.R. Rep. 100-963, at 13 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5782, 5795).

[77] There's a nagging due process issue here, as well. How can due process be satisfied in a system that allows a decision on an incomplete—and thus, inaccurate—record? Surely the loss of rights every servicemember experiences upon entering service does not extend to loss of basic constitutional rights as a veteran. This particular issue is outside the scope of this paper.

[78] 38 U.S.C. § 5107(b) (2012) ("The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue to the determination of a matter, the Secretary shall give the benefit of the doubt to the [veteran].").

demonstrate that there is an 'approximate balance of positive and negative evidence' in order to prevail . . . . In other words, . . . the preponderance of the evidence must be against the claim for benefits to be denied."[79] Further, a reasonable doubt must be resolved in the veteran's favor.[80] This standard is known "as the 'as likely as not' standard" among practitioners.[81] In line with the favorable standard, there are statutory and regulatory presumptions where the veteran has no burden of proof to establish service connection.

3. Service-Connection Presumptions

Congress has authorized numerous presumptions modifying the evidentiary requirements for establishing service connection: geographical- or conflict-based wartime,[82] peacetime,[83] and prisoner of war.[84] These presumptions are veteran-friendly, intended to acknowledge various conditions of service and award disability compensation without the standard evidentiary obligations. The presumptions are either absolute or rebuttable, setting forth a spectrum of evidentiary standards. Importantly, presumptions have evidentiary value, but they are not evidence.[85] Rather, when the facts surrounding the veteran's

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[79] Gilbert v. Derwinski, 1 Vet. App. 49, 54 (1990); *see also* 38 C.F.R. § 3.102 (2017).

[80] 38 C.F.R. § 3.102.

[81] Simcox, *supra* note 13, at 145 (quoting *Gilbert*, 1 Vet. App. 49, 54).

[82] 38 C.F.R. §§ 3.307(a)(4), 3.308(b) (tropical diseases); 38 C.F.R. §§ 3.309(d), 3.311 (diseases resulting from radiation exposure); 38 C.F.R. § 3.307(a) (diseases associated with exposure to herbicide agent); 38 C.F.R. § 3.317 (disabilities due to undiagnosed illness and medically unexplained chronic multi-symptom illness as defined by regulation). The VA website on the Disability Compensation page lists the following as "Presumed Disability."

- Former prisoners of war
- Veterans who have certain chronic or tropical diseases that become evident within a specific period of time after discharge from service
- Veterans who were exposed to ionizing radiation, mustard gas, or Lewisite while in service
- Veterans who were exposed to certain herbicides, such as by serving in Vietnam
- Veterans who served in Southwest Asia during the Gulf War

Disability Compensation, *supra* note 27.

[83] 38 C.F.R. §§ 3.307(a)(4), 3.308(b), 3.309(b) (peacetime service on or after January 1, 1947, limited tropical disease presumption, and presumptions for chronic diseases).

[84] 38 C.F.R. § 3.307 (presumption for various diseases).

[85] Routen v. West, 142 F.3d 1434, 1439 (Fed. Cir. 1998); *see also M21-1, Part III, Subpart iv, Chapter 5, Section A—Principles of Reviewing Evidence and Decision Making*, U.S. DEP'T OF VETERANS AFF. (last updated 2017), https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000014203/M21-1-Part-III-Subpart-iv-Chapter-5-Section-A-Principles-of-Rev

in-service injury or illness show the presumption is satisfied, the presumption itself substitutes for evidence to satisfy the element of service connection.[86] These presumptions also explicitly support a decision-making process with incomplete information, but only with favorable results to the veteran. Two well-established presumptions include wartime presumptions and peacetime presumptions. Both illustrate the uniquely pro-claimant nature of the adjudication process and demonstrate that the system is amenable to creating presumptions.

The wartime presumptions are absolute presumptions for diseases and disabilities "notwithstanding there is no record of evidence of such disease during the period of service."[87] According to 38 U.S.C. § 1112, there are forty-five diseases that require no evidence of disease during wartime service.[88] Section 1116 identifies eight diseases related to exposure to herbicides and service in Vietnam[89] and Section 1118 sets forth presumptive service connection for service during the Persian Gulf War within "the Southwest Asia theater of operations."[90] In these contexts, a veteran's presence in a geographical area during a conflict is sufficient to establish service connection given the well-established disease or injury associated with that area during a conflict.

The presumptions for "peacetime disability compensation" are less strong than the wartime disability compensation presumptions. The peacetime presumptions, however, do set forth a relaxed evidentiary burden. Section 1133 establishes a presumption for service connection to "a tropical disease or a resultant disorder or disease" due to treatment or preventive care of a tropical disease.[91] The presumption of service connection requires only that the disease or disorder is "shown to exist within one year after separation from active service" or other incubation period that supports the connection.[92]

Most recently, VA created a presumption for claims related to exposure to contaminated water at Camp Lejeune.[93]

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iewing-Evidence-and-Decision-Making?query=m21-1%20part%20iii%20subpart%20iv%20chapter%205%20section%20a%20principles%20of%20reviewing%20evidence%20and%20decision%20making [https://perma.cc/5ABP-46MM].

[86] *Routen*, 142 F.3d at 1440; *see also M21-1, Part III, Subpart iv, Chapter 5, Section A—Principles of Reviewing Evidence and Decision Making*, *supra* note 85.

[87] 38 U.S.C. § 1112(a) (2012).

[88] *Id.*

[89] 38 U.S.C. § 1116.

[90] 38 U.S.C. § 1118(a)(3).

[91] 38 U.S.C. § 1133(a).

[92] *Id.*

[93] "From the 1950s through the 1980s, people living or working at the U.S. Marine Corps Base Camp Lejeune, North Carolina, were potentially exposed to drinking water contaminated with industrial solvents, benzene, and other chemicals." *Public Health*, U.S.

This new rule took effect March 14, 2017, amending 38 C.F.R. section 3.307 to include presumptive service connection for "disease associated with the contaminants in the water supply at Camp Lejeune."[94] For veterans "who served at Camp Lejeune for no less than 30 days (consecutive or nonconsecutive)" between August 1, 1953, to December 31, 1987, in the absence of "affirmative evidence to establish that the individual was not exposed to contaminants in the water supply during that service," the veteran "shall be presumed to have been exposed to contaminants in the water supply."[95]

At the opposite end of presumptions favoring the existence of injury or disease, there is a presumption of sound condition that applies to both wartime and peacetime disability compensation.[96] This presumption assumes that a veteran was of sound condition at the time she entered service. This presumption, unlike the other presumptions, articulates how it may be rebutted by the Secretary.[97] To satisfactorily rebut the presumption of sound condition, the clear and unmistakable evidence must demonstrate "that an injury or disease existed prior thereto and was not aggravated by such service."[98] Only if the government can provide "clear and unmistakable evidence of both a preexisting condition and a lack of in-service aggravation" can the presumption of soundness be rebutted.[99] Clear and unmistakable is a high burden of proof, more stringent than the clear and convincing evidence standard.[100] Thus, this presumption strongly favors the veteran and falls in line with the veteran-friendly, non-adversarial nature of the claims process.

These various presumptions reflect VA's pro-veteran stance as far as removing the burden of proof when there is no question that the veteran's service establishes one or more of the required elements for a disability compensation claim. In

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DEP'T OF VETERANS AFF., https://www.publichealth.va.gov/exposures/camp-lejeune/ [https://perma.cc/8A3R-L5J2]; *see also* 38 C.F.R. § 3.307(a)(7) (including presumptive service connection for "[d]iseases associated with exposure to contaminants in the water supply at Camp Lejeune"). For the proposed rule, see 81 Fed. Reg. 62419 (Sept. 9, 2016), https://www.gpo.gov/fdsys/pkg/FR-2016-09-09/pdf/2016-21455.pdf [https://perma.cc/2BTA-63TG]; *see also* Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-54, § 102(b)(1), 126 Stat. 1165, 1168 (codified as amended at 38 U.S.C. § 1787).

94 38 C.F.R. § 3.307(a), (a)(7) (2017).

95 *Id.*; *see also* 82 Fed. Reg. 4173 (Jan. 13, 2017), https://www.gpo.gov/fdsys/pkg/FR-2017-01-13/pdf/2017-00499.pdf [https://perma.cc/G3GW-NGUV].

96 38 U.S.C. § 1111.

97 *Id.*

98 38 C.F.R. § 3.304(b); 70 Fed. Reg. 23027 (May 4, 2005).

99 Wagner v. Principi, 370 F.3d 1089, 1096 (Fed. Cir. 2005) (discussing legislative history of 38 U.S.C. § 1111 in the context of wartime service).

100 *See* Vanerson v. West, 12 Vet. App. 254, 258–59 (1999).

addition to these presumptions, there are two other relevant evidentiary considerations to discuss.

4. Relaxed Evidentiary Burden for Records Destroyed in the 1973 Fire

Beyond the presumptions that remove the veteran's evidentiary burdens, VA has also recognized a need for a relaxed evidentiary burden in cases where a veteran's records were destroyed by the 1973 fire.[101] This relaxed evidentiary burden differs from the previously discussed presumptions since it is not statutory and not a presumption.[102]

Further, VA responded to the predicament veterans face in establishing a claim for service-connected disability compensation when their records are among the millions of records destroyed by the fire[103] by creating procedures for reconstructing these records. VA's procedure for reconstructing records starts when the veteran files NA Form 13055, Request for Information Needed to Reconstruct Medical Data, as part of a claim for disability compensation.[104] Based on the information provided, VA requests "NPRC to reconstruct any applicable records."[105] As with the statutory rebuttable presumptions, VA reviews the evidence more favorably to veterans in this situation. As stated on the VA website, VA does "not rely only on the service treatment records when deciding claims for cases that are related to the 1973 fire. [The veteran] can provide or request [VA] to obtain supplemental records."[106] VA will "accept photocopies of any service treatment records" the veteran possesses as well as alternative sources of evidence.[107]

5. Alternative Sources of Evidence

This final consideration for evidentiary burdens recognizes that sometimes service medical records are just not

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[101] *See Veteran Records Destroyed by Fire in 1973*, U.S. DEP'T OF VETERANS AFF., http://www.benefits.va.gov/COMPENSATION/NPRC1973Fire.asp [https://perma.cc/L48X-CT2H].

[102] *Id.*; *see also The 1973 Fire, National Personnel Records Center*, NAT'L ARCHIVES AT ST. LOUIS, https://www.archives.gov/st-louis/military-personnel/fire-1973.html [https://perma.cc/N5T9-UYE8].

[103] *Veterans' FAQ*, *supra* note 20 ("Archival Records, FAQ: . . . Was my record destroyed in the 1973 Fire? If so, what information is available to me?").

[104] *Veteran Records Destroyed by Fire in 1973, supra* note 101; *see also M21-1, Part III, Subpart iii, Chapter 2, Section E—Unique Claims and Situations That Require Special Handling*, *supra* note 18.

[105] *Veteran Records Destroyed by Fire in 1973, supra* note 101.

[106] *Id.*

[107] *Id.*; *see infra* Section I.B.5.

available for consideration. Even though "medical evidence is almost always needed to" establish the requisite nexus between the current disability and an in-service event or injury,[108] VA has determined that alternative evidence may be submitted to try to establish service connection. This is because lack of service medical records or medical opinions is not supposed to be an automatic bar to establishing a relationship between service and a disability or disease. According to federal statute, VA must consider "the places, types, and circumstances of such veteran's service as shown by such veteran's service record, the official history of each organization in which such veteran served, such veteran's medical records, and all pertinent medical and lay evidence."[109] There are a number of recognized types of evidence that can be submitted in addition to or in place of service medical records to meet the nexus requirement.[110] As long as there is competent evidence to establish service connection, medical or lay evidence may be presented to meet the veteran's initial burden.[111]

The M21-1 Manual identifies the types of alternative evidence a veteran may use to supplement or as a substitute for service treatment records:

- statements from service medical personnel
- certified "buddy" statements or affidavits
- accident and police reports
- employment-related examination reports
- medical evidence from civilian/private hospitals, clinics, and physicians that treated the Veteran during service or shortly after separation
- letters written during service
- photographs taken during service
- pharmacy prescription records, and/or
- insurance-related examination reports.[112]

Unlike the presumptions, these alternative sources of evidence are no guarantee of sufficiency to establish service

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[108] BARTON F. STICHMAN ET AL., VETERANS BENEFITS MANUAL 128 (2014); Davidson v. Shinseki, 581 F.3d 1313, 1316 (Fed. Cir. 2009).

[109] 38 U.S.C. § 1154(a) (2012).

[110] *M21-1, Part III, Subpart iii, Chapter 2, Section E—Unique Claims and Situations That Require Special Handling*, *supra* note 18. ("III.iii.2.E.2.b. Types of Evidence VA May Use to Supplement or as a Substitute for STRs.").

[111] *Id.*

[112] *Id.*

connection. Instead, the alternatives are evaluated for credibility, competency, and consistency with other evidence.[113] VA is obligated to consider "all pertinent medical and lay evidence"[114] in evaluating a claim and at the administrative appeal level, the BVA has a heightened obligation "to evaluate and discuss all of the evidence that may be favorable to the appellant" when a veteran's service medical records have been "lost or destroyed."[115] A veteran may be able to overcome a lack of records by statutory presumption. For example, when a combat veteran's records were destroyed while in the government's care, resulting in no medical records of the veteran's medical status at the time he left service, the veteran is able to rely on the presumption given to veterans in combat.[116] The veteran's assertion that his trench feet condition is related to his service is enough to establish service connection because trench feet is a condition consistent with engaging in combat, and he thus benefits from the combat statutory presumption.[117] But for a veteran with no records and no applicable presumption, such a claim would likely be denied due to lack of evidence.

II. NO RECORDS, NO SERVICE CONNECTION, NO BENEFITS

Despite the explicitly pro-veteran construct of disability claims adjudication and the uniquely pro-veteran duties and evidentiary principles, veterans typically face an insurmountable burden in cases where service medical records have been lost or destroyed. During claims adjudication, VA may reject alternative evidence because the events established by the alternative evidence are "not reflected in the service record."[118]

This rejection of alternative evidence is typically upheld on appeal, even in cases involving the 1973 fire where a procedurally relaxed evidentiary standard exists. Inexplicably, the Federal Circuit rejected an argument "that the destruction of records while in the government's custody should result in a

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[113] *M21-1, Part III, Subpart iv, Chapter 5, Section A—Principles of Reviewing Evidence and Decision Making*, *supra* note 85 (defining various evidentiary concepts and setting forth procedures for applying the evidentiary concepts in evaluating claims).

[114] 38 U.S.C. 1154(a).

[115] Washington v. Nicholson, 19 Vet. App. 362, 370–71 (2005); Ussery v. Brown, 8 Vet. App. 64, 68 (1995); Moore v. Derwinski, 1 Vet. App. 401, 406 (1991).

[116] *Moore*, 1 Vet. App. at 405.

[117] *Id.* (applying 38 U.S.C. § 354(b) (1988), 38 C.F.R. §§ 3.304(d), 3.102 (last sentence) (1990)).

[118] *Wading Through Warehouses of Paper*, *supra* note 19, at 32–34 (prepared statement of Richard Dumancas, Deputy Director for Claims, the American Legion) (quoting 38 U.S.C. § 1154).

relaxed evidentiary standard for veterans."[119] Despite the government's arguments, there is a relaxed evidentiary standard and process in place for records lost or damaged by the 1973 fire. With this in mind, there seems little hope for veterans such as McMullan whose records are lost in some other way but still lost at no fault of the veteran.

Ultimately, the idea of a presumption for service connection in the absence of service medical records has been rejected either implicitly or explicitly from the early stage of agency decision-making all the way to the Federal Circuit. Together these rejections can be categorized into four purported reasons for rejecting a presumption in the face of lost or destroyed records. Before considering those four reasons, it is helpful to place the reasons in context of two Federal Circuit cases involving lost records.

A. The Federal Circuit's Rejection of an Adverse Presumption

After a typically arduous and lengthy administrative process that results in VA denying a veteran's claims, and unsuccessful appeals to the BVA and CAVC, the veteran may appeal outside of the veteran-only tribunals to the Federal Circuit. The panel at the Federal Circuit is not obligated to help the veteran develop his claim, but rather appears to take an actively adversarial approach toward veterans. At best, this approach would be neutral, but the practical effect disadvantages the veteran in the judicial process. This seems especially true in cases involving records lost or destroyed by the 1973 fire.

In two cases involving records lost in the 1973 fire, veterans argued for an adverse presumption against the government.[120] The Federal Circuit explicitly rejected arguments

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[119] Jandreau v. Nicholson, 492 F.3d 1372, 1375 (Fed. Cir. 2007).

[120] *Id.* ("To the extent that Jandreau seeks to invoke traditional evidentiary adverse inference rules, we find those rules to be inapplicable, even if we were to agree that they apply in the context of VA proceedings."); Brief of Claimant-Appellant Alva Jandreau at 14, *Jandreau*, 492 F.3d 1372 (No. 2007-7029), 2007 WL 460170 ("The effect of a loss [of records due to no fault of the veteran] should be that the [veteran's] burden of proof is relaxed."); Cromer v. Nicholson, 455 F.3d 1346, 1350 (Fed. Cir. 2006) ("[Cromer] argues that once negligent destruction is presumed, an adverse presumption of service connection should be imposed against the government."); Petition for Writ of Certiorari, Cromer v. Nicholson, No. 06-1261 (2007) 2007 WL 868959 [hereinafter Petition for Writ of Certiorari]; Appellant's Corrected Opening Brief at 24, *Cromer*, 455 F.3d 1346 (No. 05-7172), 2005 WL 2802527 ("[P]lacing the burden on the VA to disprove the alleged occurrence of appellant's in-service incident is in keeping with the overall paternalistic framework of the VA system.") (citations omitted).

for an adverse presumption.[121] It also refused to acknowledge the hypocrisy of the existing procedural allowance for lay evidence to replace service medical records when the reality is that lay evidence is typically rejected as incompetent as a medical diagnosis.[122] In responding to arguments for new presumptions in favor of veterans, the court looked only to existing VA law and regulations and did not entertain the application of a rule from another field of law or creation of a new rule. In finding that VA and Congress have not "specifically shifted" the veteran's "evidentiary burden of establishing [a] claim in veterans' benefits cases," the court rested its rejection of a presumption on those agency and congressional decisions not to do so.[123]

In deciding these cases, the Federal Circuit took a strictly statutory-based approach to reject the veterans' claims for disability compensation, reasoning that because Congress created a number of presumptions and because it did not create a presumption in cases of records lost or destroyed by the fire, the court could not recognize such a presumption.[124] In essence, the court punted the matter to Congress, relying on the assumption that Congress would necessarily craft presumptions wherever appropriate just because it had done so in some circumstances.[125]

Furthermore, even though there was alternative medical evidence presented in those cases, the lack of service medical records still stood in the way of favorable benefits decisions. In *Cromer v. Nicholson*, the court identified the existing VA framework including the procedures for handling cases involving the 1973 fire and the BVA's "heightened duty to explain its findings" in cases involving alternate sources of evidence, but said nothing about how this framework fell short in that particular case.[126] Instead, the court settled on the lack of an adverse presumption of service connection within the

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[121] *Cromer*, 455 F.3d at 1350–51.

[122] *Jandreau*, 492 F.3d at 1375–77; *see also* Buchanan v. Nicholson, 451 F.3d 1331, 1337 (Fed. Cir. 2006) ("The Veterans Court erred by affirming the Board's erroneous statutory and regulatory interpretation that lay evidence cannot be credible absent confirmatory clinical records to substantiate the facts described in that lay evidence."); *see also* Petition for Writ of Certiorari, *supra* note 120, at *9 ("[I]t is a cruel distortion of logic to read a Congressional intent to eliminate the adverse presumption from the paternalistic, pro-claimant VA system, while under a similar legislative scheme, the same common law principle flourishes in civil and other administrative fields.").

[123] *Jandreau*, 492 F.3d at 1375.

[124] *Cromer*, 455 F.3d at 1351 ("In the absence of a statutory or constitutional imperative, it would be improper for this court to impose a judicial remedy to supplant or supplement the remedies and procedures already provided by Congress and the VA.").

[125] *Id.*

[126] *Id.*

existing framework as reflecting VA's affirmative rejection of such a presumption.[127] The inconsistency of the pro-veteran claims process that recognizes a presumption in the case of records lost or destroyed by fire but not those lost or destroyed by other causes, accompanied by the hardline taken by the Federal Circuit to reject any additional presumptions means that every instance of lost or destroyed evidence may translate to a presumption against service connection. Not only is such a presumption in direct conflict with the pro-veteran system, but the presumption is not even rebuttable, and it leaves veterans with no recourse.

A presumption favoring the veteran would refrain from holding the lost records against the veteran in proving his claim—and set up a reasonable standard for measuring whatever evidence does exist, including favorable evaluation of alternative evidence offered in place of the lost or destroyed records.

B. Purported Reasons for Rejecting an Adverse Presumption

Without VA or congressional action, there is little chance for an adverse presumption to gain traction given both the Federal Circuit's explicit rejection of it, as well as the way claims without records are treated during the administrative process. Four purported reasons for rejecting an adverse presumption in the current statutory and regulatory scheme emerge after weaving the various decisionmakers' rationales together to get the full sense of the bar to an adverse presumption in the cases of lost or destroyed service medical records.

First, there is no explicit exception recognized by the law. Because a veteran has a statutory responsibility "to present and support a [benefits] claim" under 38 U.S.C. § 5107(a), there is a conflict in applying an adverse presumption as a replacement for presenting evidence.[128] Even more problematic to the court is that there are express exceptions to section 5107(a) where Congress "deemed a shift in the burden of proof to be necessary or just," but made no such express exception for records lost or destroyed while in the government's possession.[129] This is because of an erroneous assumption that congressional action is the sole mechanism for responding to lost or destroyed records.

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[127] *Jandreau*, 492 F.3d at 1375 (explaining its own decision in *Cromer*).
[128] *Cromer*, 455 F.3d at 1350–51.
[129] *Id.*

Second, the principle of adverse presumption is rooted in negligence and common law bailment; any presumption would thus require proof of the government's negligence. The Federal Circuit discussed common law bailment in *Cromer* and noted that the law in Missouri—where the fire occurred—places the "burden of showing bailee's negligence" on the bailor.[130] The court recognized that even though "the government's custody of its own records is not a bailment in the classic sense, . . . the common-law rule is instructive in these circumstances."[131] The court also explained that Cromer did not offer any decision "in which an adverse presumption or inference was drawn in the absence of bad faith or, at a minimum, negligence."[132] And thus, the court declined to "create a new rule" given the existing procedures intended to directly address the fire merely because Cromer found those procedures inadequate.[133] For similar reasons, the court explained in *Jandreau v. Nicholson*, an adverse inference is also inappropriate in the veterans' claims context because an adverse inference requires destruction "with a culpable state of mind," and the court noted the absence of a "claim here that the records were willfully or recklessly destroyed."[134] Without entertaining the possibility that the particular circumstances surrounding a veteran's lost or destroyed medical records could justify an application of the general adverse presumption rule, this reason ignores the justification of using a similar rule even without negligence given the non-adversarial nature of veterans' disability compensation law.

Third, as long as VA fulfills its statutory duty to assist veteran claimants, the absence of records cannot be used as an adverse presumption against the government. That VA makes an effort to "seek[] and obtain[] alternative medical records to supplant the records apparently destroyed in the 1973 fire" is sufficient, even when no alternative medical records exist.[135] Given the low likelihood of a veteran having both military or VA health records and private medical records covering the same time period, the use of alternative medical records is unlikely to

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[130] *Id.* at 1350 n.2.

[131] *Id.*

[132] *Id.* at 1351.

[133] *Id.*

[134] Jandreau v. Nicholson, 492 F.3d 1372, 1375–76 (Fed. Cir. 2007) (quoting Residential Funding Corp. v. De-George Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002)). The court acknowledged that there are cases where negligence creates an adverse inference, and cases where negligence is insufficient, but it avoided the question of negligence here by pointing out that "Jandreau conceded at oral argument that there was no evidence of government negligence leading to the destruction of the records." *Id.* at 1376.

[135] *Cromer*, 455 F.3d at 1351.

solve the problem of the fire's destruction of millions of records. Even so, requiring VA to do more or to treat the VA's unproductive search as an adverse presumption "would amount to a judicial amendment of the statutory duty to assist—a measure beyond the power of this court."[136] As with the rejection of an adverse presumption, this reason ignores the non-adversarial nature of the claims process as well as rejects an opportunity to fill in a regulatory or congressional gap.

Fourth, given the highly regulated process for disability compensation claims, a judicial remedy is improper. Related to VA's statutory duty to assist veteran claimants, there are specific procedures in place "precisely to ease the evidentiary burdens faced by veterans whose records were lost in the 1973 fire."[137] In particular, VA is required to help the veteran by "obtaining [medical] evidence from alternate or collateral sources" including the specific list of alternative or secondary evidence.[138] Beyond those obligations, a BVA decision rejecting a claim in a case of lost records "has a heightened duty" of explanation.[139] In light of these various constructs for handling lost records, "it would be improper . . . to impose a judicial remedy to supplant or supplement the remedies and procedures already provided by Congress and the VA."[140] There may be some legitimacy to avoiding a judicial remedy, but in the face of no alternatives available to veterans in the current statutory and regulatory schemes, the courts should step in to assist the veteran.

With no way for a veteran to overcome the various reasons against an adverse presumption, the VA's non-adversarial system turns the tables on the veteran by placing the burden on the veteran in the most difficult of circumstances. There are administrative regulations that identify alternative forms of evidence that a veteran can rely on in the absence of service medical records, but in practice, the regulations are not adhered to or at least not adhered to in a way that would give a veteran the benefit of the doubt.

To place the burden on the veteran to prove service connection in the absence of service medical records is to act in direct conflict with Congress's intent to establish and maintain

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[136] *Id.*

[137] *Id.* at 1351.

[138] *Id.* (alteration in original); *see supra* Section I.B.5. In *Jandreau*, the court also discussed the question of lay evidence as sufficient for medical diagnosis. *Jandreau*, 492 F.3d at 1376–77. That issue is outside the scope of this article but is begging for a critical analysis of how rarely alternative forms of evidence are determined successful to support a veteran's claim. *Id.*

[139] *Cromer*, 455 F.3d at 1351.

[140] *Id.*

"a beneficial non-adversarial system of veterans benefits."[141] To be clear, this article does not equate a lack of information within service medical records—something which very well could be used as evidence against establishing service connection—with a lack of information in total or in part due to unavailable service medical records. The non-adversarial VA system "has been an evolution of a completely ex-parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits."[142] Congress defined informal in this context of veterans' benefits hearings to mean: "strict rules of evidence and procedure are not enforced."[143] Yet, in rejecting a relaxed evidentiary standard and placing the burden on the veteran, VA rating officials, the Federal Circuit, and decisionmakers in between have essentially upheld VA decisions on the merits—when those "merits" are incomplete due to no fault of the veteran.

In some ways, a decision that characterizes a lack of evidence as the same as negative evidence is the essence of the traditional adversarial system, forcing a party to provide proof to certain standards. For example, even to move past the initial pleadings stage, a plaintiff must assert enough to state a claim.[144] In the world of veterans' benefits claims, however, that is not the standard; VA is obligated to help veterans develop claims, including helping to identify additional benefits a veteran might be eligible for, even when the veteran did not specifically mention such benefits in his claim.[145] VA's obligation to identify disability claims missing from an original claim is inconsistent with a system that offers no leeway in VA's evaluation of a claim involving lost or destroyed records. This inconsistency should be resolved in line with the favorable, non-adversarial nature of veterans' disability claims. Yet, as we see in returning to McMullan's story, the inconsistency is held against the veteran rather than resolved in his favor.

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141 H.R. Rep. 100-963, at 13 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5782, 5795.

142 *Id.* at 13, 1988 U.S.C.C.A.N. at 5795.

143 *Id.* at 14, 1988 U.S.C.C.A.N. at 5796.

144 FED. R. CIV. P. 8(a); 12(b)(6).

145 *See e.g.*, 38 C.F.R. § 4.16 (2017) ("It is the established policy of the Department of Veterans Affairs that all veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled.").

C. McMullan's Claim: A Presumption Against Service Connection

McMullan had the burden to establish his claim in seeking disability compensation benefits for hypertension he developed back in the 1970s. Specifically, he needed to show a current disability, an in-service event or injury, and a nexus between the current disability and that in-service event or injury. In early 1993, McMullan gave up on his claim without ever receiving his records. Over a decade later, McMullan again sought disability compensation benefits for hypertension with assistance from various groups.[146] Again, receiving no positive response from multiple records requests, VA requested additional information including service medical records. This time, though, VA also listed various alternative documents "that can substitute for service treatment records," such as buddy statements[147] or statements from family members who witnessed the effects of the veteran's hypertension.[148] McMullan submitted several alternative documents including medical records from the Commonwealth of Virginia's Department of Corrections (DOC), specifically noting McMullan's hypertension. Those records were dated October 25, 1989, and the physician noted: "[McMullan] was first diagnosed in the DOC with hypertension on or about 25Oct89. I have no knowledge of his condition prior to that time. Since 10/25/89 he has been treated with [medication] daily. Since the beginning of the regime, his hypertension has been well controlled."[149]

In that same letter noting the alternative documents McMullan could substitute for service medical records, VA informed McMullan that NPRC was unable to locate his service medical records.[150] McMullan then again personally requested his records and in response to that request, the NPRC informed him that his "medical record has been loaned to the Department

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[146] *See, e.g.*, Letter from McMullan to Dep't of Veterans Affairs, Roanoke Reg'l Office, C-file at 231, 233 (July 23, 2007) (on file with author) (marked received by Roanoke VA Regional Office July 25, 2007); Dep't of Veterans Affairs, VA Form 21-526, Part B: Compensation, C-file 253–54 (Nov. 5, 2007) (on file with author) (marked received by Roanoke VA Regional Office Nov. 5, 2007).

[147] Letter from Dep't of Veterans Affairs, Roanoke Reg'l Office, C-file at 329 (July 2, 2008) [hereinafter Roanoke Reg'l Office Letter] (on file with author); *see also Fully Developed Claims*, U.S. DEP'T OF VETERANS AFF., https://www.benefits.va.gov/fdc/index.asp [https:// perma.cc/NF7E-BS9Q] (defining "buddy statements" as "letters from friends or those you served with that tell us about the facts of your claim").

[148] Roanoke Reg'l Office Letter, *supra* note 147.

[149] Patient Progress Notes, C-file at 372 (Nov. 13, 1990) (on file with author).

[150] Roanoke Reg'l Office Letter, *supra* note 147.

of Veterans Affairs"—even though according to the most recent letter from VA, NPRC was unable to find his records.[151]

Once again, without McMullan's service medical records, VA issued a rating decision by letter on October 2, 2008, rejecting McMullan's request to revise its earlier decision.[152] In part, the "decision was based on the fact that we did not have your service treatment records."[153] According to the letter, there was no evidence to indicate that McMullan was first treated for hypertension in December 1977. Instead, "the earliest evidence of treatment came from Dr. Michael Gafney. Treatment records from the Commonwealth of Virginia, Department of Corrections showed that you were being treated for hypertension. The letter from Dr. Michael Gafney and treatment records [from] the Virginia Department of Corrections did not show a link between your military service and hypertension."[154]

In that same rating decision, VA noted that it "received notification that the [service treatment] records had been found, however, [VA has] not received your service treatment records."[155] And then just three weeks later, the NPRC explained that it had

> been unable to locate the record needed to answer your request. The military record was removed from the file area in order to respond to a prior inquiry. Although we have conducted an extensive search, we have not been able to locate the record. Please be assured that we will continue to do all that is possible to locate the information you requested. The file area has been marked and upon locating the record, a copy will be furnished to you as expeditiously as possible.[156]

McMullan continued seeking help, including congressional assistance and additional medical care.[157] In April 2009, McMullan saw a VA doctor, and that doctor noted in his records that McMullan

> has hypertension currently treated with [medications]. He also carries a statement from 11-13-1990 stating that he was hypertensive at least since October 1989. There are no records indicating his hypertension status prior to that date. However, based on statistical probabilities, it is likely that [the veteran] was hypertensive for several years prior

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[151] Letter from Nat'l Pers. Records Ctr., C-file at 342 (July 28, 2008) (on file with author); Roanoke Reg'l Office Letter, *supra* note 147.

[152] Dep't of Veterans Affairs, Roanoke Reg'l Office, Rating Decision, C-file at 350–54 (Oct. 2, 2008) (on file with author).

[153] *Id.* at 351.

[154] *Id.* at 353.

[155] *Id.*

[156] Letter from Nat'l Pers. Records Ctr., C-file at 341 (Oct. 23, 2008) (on file with author). There was no indication that NPRC had sent the records to VA, nor any indication that it had found the records at some earlier point in time.

[157] *See, e.g.*, Letter from McMullan to Hon. Elijah E. Cummings & Hon. Barbara Mikulski, C-file at 360 (Jan. 27, 2009) (on file with author).

> to 1989. I have no way to document his [blood pressure] or treatment prior to that time.[158]

In August 2009, the VA again denied the hypertension claim. In this decision, VA listed the evidence considered and that list included a statement from McMullan's family members[159] as well as the VA physician's notes from April 2009.[160] No explanation was provided as to how this evidence was inadequate given the unique status of his missing service medical records. Instead, the rating decision rejected the family's letter as "competent medical evidence of the disability."[161] Again relying on the physician's notes in the prison medical file, VA concluded that the lack of service connection remained.[162]

Between 2009 and 2014, McMullan continued requesting his service medical records and was repeatedly informed that no one knew where his records were.[163] Still without receipt of his records, McMullan filed a new Application for Compensation And/Or Pension in October 2012. On that form, McMullan listed hypertension as a disability with a beginning date of February 18, 1978.[164] In January 2013, VA wrote to McMullan requesting evidence that showed service connection to hypertension with new and material evidence.[165] After more unsuccessful attempts to find McMullan's service medical records, VA gave up on trying to locate McMullan's records:

> We have determined that your service treatment records (STRS) for your U.S. Army service [date range redacted] cannot be located and therefore are unavailable for review. All efforts to obtain the needed information

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158 Letter from Dr. Vasilios Papademetriou, Veterans Affairs Med. Ctr., C-file at 369 (Apr. 30, 2009) (on file with author).

159 Dep't of Veterans Affairs, Huntington Reg'l Office, Rating Decision, C-file at 565–66 (Aug. 25, 2009) (on file with author); Letter from Seven of McMullan's Family Members, C-file at 345 (Dec. 21, 2008) (on file with author).

160 Dep't of Veterans Affairs, Huntington Reg'l Office, Rating Decision, *supra* note 159; Letter from Dr. Vasilios Papademetriou, Veterans Affairs Med. Ctr., *supra* note 158.

161 Dep't of Veterans Affairs, Huntington Reg'l Office, Rating Decision, *supra* note 159.

162 *Id.* at 566–67.

163 Report of General Information, Dep't of Veterans Affairs Form 21-0820, C-file at 430 (Nov. 19, 2009) (on file with author) (noting "Veteran called in to request copies of all of his medical records"); Report of General Information VA Form 21-0820, C-file at 432 (Dec. 21, 2009) (on file with author) (noting "Veteran called to follow up on his request. [V]eteran requested copies of all medical records in his claims files."). In September 2010, VA reported that "[t]he service records you requested are not located at our station . . . . [W]e do not know the whereabouts of your medical records." Letter from Dep't of Veterans Affairs, Balt. Reg'l Office, C-file at 439 (Sept. 7, 2010) (on file with author).

164 Dep't of Veterans Affairs, Veteran's Application for Compensation And/Or Pension VA Form 21-526, C-file at 446–51 (Oct. 26, 2012) (on file with author).

165 Letter from Dep't of Veterans Affairs, Balt. Reg'l Office, C-file at 454–57 (Jan. 15, 2013) (on file with author).

> have been exhausted, and based on these facts, we have determined that further attempts to obtain the records would be unsuccessful.[166]

In August 2014, McMullan—a veteran—became homeless, forced to live in his vehicle. At that time, he received assistance from the Veterans of Foreign Wars Service Office in seeking a reopening of his claim. He submitted new evidence by way of a buddy statement dated September 18, 2014: "I also knew [McMullan] was not able to reenlist because of [h]igh blood pressure."[167] In response, VA issued another negative rating decision on hypertension based on lack of evidence.[168] There is no mention of the buddy statement dated September 18, 2014, that was stamped as received by VA on September 19, 2014—ten days before the rating decision was issued. Thus, it appears that the buddy statement was not considered in VA's decision not to reopen the hypertension claim, and VA did not explain why the buddy statement was not considered. Even worse, with no explanation for how his alternative evidence could be used to substantiate his claim for benefits given the absence of his service treatment records, this final denial left McMullan with no path forward. In VA's own words recorded in an internal document: "Evidence of all written and telephonic efforts to obtain the records is in the file. All efforts to obtain the needed

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[166] Letter from Dep't of Veterans Affairs, Togus Reg'l Office, C-file at 471–73 (June 28, 2014) (on file with author).

[167] Letter from [Redacted], C-file at 505 (Sept. 18, 2014) (on file with author).

[168] Letter from Dep't of Veterans Affairs, Togus Reg'l Office, C-file at 508–13 (Sept. 29, 2014) (on file with author). The decision letter "explains" the decision:

- The evidence from no evidence submitted is not new and material evidence because it was previously submitted and considered in the rating decision of 10/08/2008.
- The evidence from no evidence is not new and material evidence because it does not establish a fact necessary to substantiate the claim and does not raise a reasonable possibility of substantiating the claim.
- The claim for service connection for hypertension remains denied because the evidence submitted is not new and material. The rating decision dated October 8, 2008 denied service connection for hypertension as there was no event in-service and the condition existed after service. To date we have not received any evidence relating to those facts.

Id. In the Rating Decision letter, VA again recognized the lack of service medical records in explaining its denial of service connection for hypertension: "Efforts to obtain your service treatment records from all potential sources were unsuccessful. The rating decision dated May 21, 1992 denied service connection for hypertension as there was no [evidence of] event in-service and the condition that existed after service. To date we have not received any evidence relating to those facts." Dep't of Veterans Affairs, Togus Reg'l Office, Rating Decision, C-file at 521–25 (Sept. 29, 2014) (on file with author).

military records have been exhausted; and any further attempts would be futile."[169]

McMullan's story is heartbreaking, but it is not unique. Without service medical records to substantiate service connection, even when the lack of records is the result of government loss or destruction, a veteran may be left with nothing. Perhaps most significantly in terms of establishing service connection, the timing of the claim can create insurmountable challenges: many veterans file claims years after completing service, and even if they are able to prove a current diagnosis, trying to produce evidence to establish the existence of a medical condition or a particular in-service event at a certain time—sometimes decades prior—may be impossible.[170] With this construct in mind, this article proposes administrative and statutory remedies to relax the evidentiary burden for establishing service connection when service medical records are lost or destroyed.

III. RELAXING THE BURDEN FOR ESTABLISHING SERVICE CONNECTION WHEN RECORDS ARE LOST OR DESTROYED

Service connection is all about timing. What should be done when the only evidence that can establish a connection between a veteran's current disability and his active duty service is lost or destroyed through no fault of the veteran?

That the government loses service medical records is a reality.[171] And the loss of medical records is a reality that

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[169] Dep't of Veterans Affairs, Rating Decision/Administrative Decision/Formal Finding/Statement of the Case (SOC)/Supplemental Statement of the Case (SSOC), VA Form 21-0961, C-file at 9 (Sept. 29, 2014) (on file with author). Later attempts to find McMullan's records also failed, but the National Personnel Records Center repeatedly reported that his records were "charged out to the Department of Veterans Affairs for the adjudication of a claim." Letter from Nat'l Pers. Records Ctr., (Feb. 6, 2015) (on file with author); Letter from Nat'l Pers. Records Ctr., (June 23, 2015) (on file with author).

[170] James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 115–16 (2009).

[171] *See supra* Section I.B.4 (discussing records destroyed by the 1973 fire). Maybe digital recordkeeping will change that, or at least decrease the number of lost records. Electronic health records are one of VA's initiatives, but a recent report indicates some concerns and delays in electronic health recordkeeping. *See* Valerie C. Melvin, Dir. Information Mgmt. & Tech. Resources Issues at the U.S. Gov't Accountability Office, Testimony Before the Subcomm. on Military Construction, Veterans Affairs, and Related Agencies, Comm. on Appropriations, U.S. Senate, Electronic Health Records: VA's Efforts Raise Concerns about Interoperability Goals and Measures, Duplication with DOD and Future Plans (2016), http://www.gao.gov/assets/680/678367.pdf [https://perma.cc/NBD3-ZTCT]. For testimony about the potential benefits of digital recordkeeping, see *Wading Through Warehouses of Paper*, *supra* note 19, at 36 (prepared statement of Michael R. Viterna, President, National Association of Veterans Advocates) (discussing benefits of "fewer VA personnel" handling files; fewer inquiries from veterans and veterans'

veterans pay for, when they've already paid with their service, and for many, their ongoing medical, emotional, and societal issues.[172] Since VA recognized the need to provide some sort of response to the 1973 fire, there is precedent for allowing alternative forms of evidence and relaxing evidentiary burdens beyond the congressionally recognized statutory presumptions. Given the courts' resistance to find a remedy in the absence of a regulation or statute, however, a judicial remedy seems at best inefficient and at worst a total failure. Even so, I include a few observations on a judicial remedy here.

A judicial remedy may be superfluous if both proposed administrative and statutory remedies are also implemented. A judicial remedy requires a recognition of the unique nature of veterans' benefits law. Veterans' benefits law simply is not like any other area of law given the non-adversarial and veteran-friendly characteristics of veterans' disability compensation and it should not be a candidate for decisions made by strict analogy to other areas of the law. Rather than use the distinctiveness of veterans' issues as a reason to assume Congress would take action if it wanted to, courts should look for veteran-friendly approaches to deciding appeals, just as there is a veteran-friendly approach to deciding claims in the administrative process.

The Federal Circuit would not have to reverse itself or acknowledge some type of mistake by reaching a different decision in the next case involving lost or destroyed records. Indeed, the court could lay a foundation for how the uniqueness of these cases requires a specialized interpretation and application of law. The court could start with the overriding framework of giving the benefit of the doubt to the veteran claimant by applying a relaxed evidentiary standard. This remedy seems unlikely, however, given the judicial branch's resistance thus far and for that reason, my solutions are directed at VA and Congress.

A just remedy does not call for an automatic decision in favor of a veteran with lost or destroyed service medical records.

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representative; and ease of records access when multiple claims are being processed simultaneously at different stages).

[172] It is worth noting VA's repeated requests for any records that are in the veteran's custody. There is some false assumption that veterans have copies of their service medical records (and that they are just not including them in the claims filings). At least anecdotally and specifically in regard to enlisted servicemembers, out-processing can be confusing; many separating servicemembers are not particularly focused on recordkeeping, but rather on the next step in life. Placing the burden on the veteran to maintain the records is unrealistic and unfair. The challenges to accessing service medical records is explicitly acknowledged by the congressional mandate for VA to assist veterans in finding records. *See supra* Section I.B.1 (discussing VA's duty to assist in obtaining records).

Any remedy should give veterans the benefit of the doubt, but there should be no room for fraudulent or unfounded claims. Instead, a responsive remedy would allow a veteran to get past the absence of service medical records by providing alternative sources of evidence to establish service connection. When that evidence is enough to suggest service connection, the burden should shift to VA to prove otherwise.

Here I offer two remedies—administrative and statutory—to address the problems veterans face when trying to establish service connection in the absence of service medical records due to no fault of their own. With these remedies, there would be no need for a judicial remedy as the courts would simply apply the new relaxed evidentiary burden in future cases.

A. Administrative Remedy

At the administrative stage, a simple solution would be to extend the relaxed evidentiary burden to all claims involving records that were lost or destroyed for any reason or no reason at all while those records were in a government agency's control. Under this relaxed standard, there would be no requirement for the veteran to prove negligence. Instead, the relaxed evidentiary burden would take effect when VA issued a declaration that "it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile."[173] At that point, VA would reevaluate the claim giving no weight—positive or negative—to the lack of service medical records and instead evaluate a claim based on the alternative evidence submitted by the veteran. The alternative evidence should be evaluated in the light most favorable to the veteran. If it is "as likely as not" from the alternative evidence that service connection is established, the alternative evidence should be deemed sufficient within the relaxed evidentiary approach.

Giving the veteran the benefit of the doubt is consistent with the non-adversarial construct of veterans' claims law. The alternative evidence would essentially create a rebuttable presumption of service connection. A presumption would not be an absolute assumption of service connection. Instead, it would place the burden on the government to show lack of service connection rather than rule against the veteran on a lack of information when that lack of information is due to no fault of the veteran. Creating the rebuttable presumption of service connection in these limited circumstances of lost or destroyed

[173] 38 U.S.C. § 5103A(c)(2) (2012).

records is consistent with VA's obligation to help veterans develop their claims.

1. Proposed Regulation for Relaxed Evidentiary Burden

The existing presumptions are codified within 38 C.F.R. §§ 3.303-3.318. The following proposal for a new presumption would be inserted as 3.319—a section currently reserved with no text.

> 3.319. PRESUMPTIVE SERVICE CONNECTION WHEN SERVICE MEDICAL RECORDS ARE LOST OR DESTROYED.
>
> (a) General. Service medical records are the preferred source of evidence for establishing service connection, but when those records are lost or destroyed due to no fault of the veteran, alternative evidence must be allowed to substitute for those records even when the alternative evidence is not as strong as a service medical record.
>
> (b) Presumptive service connection by alternative evidence. When service medical records are lost or destroyed, alternative forms of evidence must be evaluated giving the benefit of the doubt to the veteran consistent with 38 C.F.R. § 3.102.[174] Alternative forms of evidence include
>
> (i) certified statements from the veteran-claimant
>
> (ii) certified buddy statements or affidavits[175]
>
> (iii) police or accident reports
>
> (iv) medical evidence from private hospitals, clinics, or physicians where the veteran received treatment during service or within 18 months from separation
>
> (v) pharmacy prescription records
>
> (vi) employment-related physical examinations
>
> (vii) insurance-related physical examinations
>
> (viii) letters written during service
>
> (ix) photographs taken during service
>
> (c) Establishing the presumption. To establish presumptive service connection, at least two forms of alternative evidence must be provided in support of a claim. Equal weight must be given to all types

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[174] 38 C.F.R. § 3.102 (2017) ("The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardship.").

[175] "VA considers a buddy statement 'credible' if the evidence of record shows the fellow service member served in the same unit and at the same time as the Veteran claims he/she was injured in combat." *M21-1, Part III, Subpart iii, Chapter 2, Section E—Unique Claims and Situations That Require Special Handling*, *supra* note 18.

> of alternative evidence and a credibility determination may not be made on the mere basis that the alternative evidence is unaccompanied by contemporaneous medical evidence.[176] As long as the alternative evidence is credible and consistent with the circumstances, conditions, or hardships of service, the alternative evidence shall be accepted as a presumption of service connection in the absence of a service medical record.[177]
>
> (d) Effect on other elements of a claim. This subsection has no effect on establishing the other elements of a disability compensation claim (e.g., medical evidence of a current disability or disease).
>
> (e) Latent discovery of service medical records. In the rare possibility that service medical records are located after being identified as lost or destroyed, any claims granted or denied will be reviewed with the new evidence considered. If the service medical record establishes beyond a reasonable doubt a lack of service connection for a claim, all benefits related to that claim will cease with no collection for past payments. If the service medical record establishes service connection, all benefits related to that claim will continue consistent with the prior presumption of service connection.[178]

2. The Administrative Remedy in Action

In seeking disability compensation for hypertension and learning that his service medical records were lost, McMullan provided multiple forms of alternative evidence: his own statement of reenlistment denial due to hypertension;[179] a buddy statement claiming awareness of the hypertension diagnosis;[180] family members' signed statement as to awareness of the hypertension diagnosis;[181] a physician's note of statistical probability that McMullan had hypertension before 1989 and the explicit acknowledgement that it is impossible—years later—to determine McMullan's blood pressure prior to 1989.[182]

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[176] *See* Buchanan v. Nicholson, 451 F.3d 1331, 1337 (Fed. Cir. 2006).

[177] *See* 38 U.S.C. § 354(b); 38 C.F.R. §§ 3.304(d), 3.102.

[178] Any beneficiaries of benefits due to a presumptive service connection would be subject to the same criminal penalties as other beneficiaries for fraudulent claims as investigated and prosecuted by VA Office of the Inspector General. *About the Office of Investigations*, DEP'T OF VETERANS AFF., OFF. OF INSPECTOR GEN., http://www.va.gov/oig/about/investigations.asp [https://perma.cc/82TC-WEU3]. Inspections into benefits programs are a priority of the Inspector General's office and this presumption for service connection would likely be evaluated in the context of disability payments made or withheld. *See* Nikki Wentling, *Veterans Denied Millions in Benefits by VA*, STARS & STRIPES (Oct. 1, 2016), http://www.military.com/daily-news/2016/10/01/veterans-denied-millions-in-benefits-by-va.html [https://perma.cc/4JEY-G3LY].

[179] Veterans Admin., Veteran's Application for Compensation and/or Pension, VA Form 21-526, C-file at 183 (Oct. 22, 1990) (on file with author) (describing nature and history of disability as "turned down for reenlistment in 1978 because of high blood pressure").

[180] Letter from [Redacted], *supra* note 167.

[181] Letter from Seven of McMullan's Family Members, *supra* note 159.

[182] Letter from Dr. Vasilios Papademetriou, Veterans Affairs Med. Ctr., *supra* note 158.

Under the proposed regulatory framework, these alternative forms of evidence would be acceptable in the absence of his service medical records.[183] The alternative evidence would have been evaluated for credibility and consistency with circumstances, conditions, or hardships of McMullan's service. If there was anything in the file to indicate the impossibility of McMullan having hypertension in 1978, that some intervening condition or event occurred after McMullan's service ended, or that McMullan's hypertension was the result of willful misconduct or abuse of alcohol or drugs, the presumption would not be given.[184] Otherwise, if the multiple consistent forms of alternative evidence were deemed credible, McMullan would have established a presumptive service connection. And from there, VA would rate his disability in determining his benefits.

This approach to considering alternative evidence in the absence of records is consistent with the Federal Circuit's explanation of the intersection of lay evidence and service medical records when the service medical records do not confirm the lay evidence. In *Buchanan*,[185] the court rejected the BVA's decision that "lay statements lack credibility absent confirmatory clinical records to substantiate such recollections."[186] The court explained that even though "the lack of contemporaneous medical records may be a fact that the BVA can consider and weigh against a veteran's lay evidence, the lack of such records does not, in and of itself, render lay evidence not credible."[187] Thus, even when service medical records exist and are considered as part of a claim accompanied by lay evidence to establish service connection, "the lack of contemporaneous medical evidence should not be an absolute bar to the veteran's ability to prove his claim of entitlement to disability benefits" using credible and competent lay evidence.[188]

The proposed administrative approach is also consistent with the BVA's responsibility to assess credibility of lay evidence. As the Federal Circuit explained in *Jandreau*, "[l]ay evidence can be competent and sufficient to establish a diagnosis of a condition when" certain conditions are met.[189] First, the layperson

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183 *See supra* Section I.B.5.

184 *See infra* Section III.B.

185 *Buchanan*, 451 F.3d at 1336.

186 *Id.*

187 *Id.*

188 *Id.* at 1337.

189 Jandreau v. Nicholson, 492 F.3d 1372, 1377 (Fed. Cir. 2007); *see also* Hazelett v. McDonald, No. 14-0399, 2015 WL 1537618, at *3–4 (Ct. Vet. App. Apr. 7, 2015) (explaining the requirement for the Board to consider all three ways lay evidence can be competent). *But see* Jandreau v. Shinseki, 23 Vet. App. 12, 16–18 (2009) (describing the

must be "competent to identify the medical condition."[190] Second, the layperson must report a contemporaneous medical diagnosis.[191] And third, the layperson's testimony about symptoms must be consistent with a "later diagnosis by a medical professional."[192]

Ideally, an administrative remedy would be sufficient to give veterans the benefit of the doubt within the statutorily-guaranteed non-adversarial adjudication process. Given the complexity of the claims process and potential for inconsistencies, however, any administrative remedy in this context likely needs a similar statutory scheme to ensure consistency in evaluating claims without service medical records.

B. Statutory Remedy

If a regulatory solution is too complicated given VA's various other priorities, congressional action may be more efficient, and may even help to spur eventual regulatory action. A statutory fix would also be relatively simple in terms of adding new language to the existing statutory scheme.

1. Proposed Statutory Amendment for Relaxed Evidentiary Burden

The relevant existing statutory section is 38 U.S.C. § 5103A Duty to assist claimants. Specifically, the following proposed statutory language would be inserted after the existing subsection (c)(2) as a new (c)(3):

> (3) Whenever the Secretary has determined it is reasonably certain that requested service medical records do not exist or that further efforts to obtain the requested records would be futile,[193] the Secretary shall accept alternative evidence as sufficient proof[194] of service connection to any disease or injury alleged to have been incurred in or aggravated by such service.

Federal Circuit's decision in *Jandreau* and stating that "[T]he secretary correctly points out that the Federal Circuit provided no citation of law for its discussion in *Jandreau* of the circumstances where lay evidence may be competent to diagnosis (sic) certain medical conditions" in support of the court's rejection of Jandreau's claim for attorney fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)).

190 *Jandreau*, 492 F.3d at 1377.

191 *Id.*

192 *Id.*

193 *See* 38 U.S.C. § 5103A(c)(2) (2012).

194 There is already a statutory duty for the Secretary to "give the benefit of the doubt to the [veteran]." 38 U.S.C. § 5107(b). This acceptance of alternative evidence similarly gives the benefit of the doubt to the veteran "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter." 38 U.S.C. § 5107(b).

(A) This presumption of service connection shall be established by at least two forms of alternative evidence, as defined by (C), provided in support of service connection. Equal weight must be given to all types of alternative evidence and a credibility determination may not be made on the mere basis that the alternative evidence is unaccompanied by contemporaneous medical evidence.[195] As long as the alternative evidence is credible and consistent with the circumstances, conditions, or hardships of service, the alternative evidence shall be accepted as a presumption of service connection in the absence of a service medical record.[196]

(B) This presumption is rebuttable by clear and unmistakable evidence[197] that demonstrates (i) the impossibility of the existence and timing of the event, injury, or disease;[198] (ii) the disease or disability was caused by a supervening condition or event that occurred after the veteran's service ended; or (iii) the disease or disability is the result of the veteran's own willful misconduct or the abuse of alcohol or drugs.[199]

(C) Alternative evidence includes, but is not limited to, the following:

(i) certified statements from the veteran-claimant

(ii) certified buddy statements or affidavits[200]

(iii) police or accident reports

(iv) medical evidence from private hospitals, clinics, or physicians where the veteran received treatment during service or within 18 months from separation

(v) pharmacy prescription records

(vi) employment-related physical examinations

(vii) insurance-related physical examinations

(viii) letters written during service

(ix) photographs taken during service[201]

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[195] *See* Buchanan v. Nicholson, 451 F.3d 1331, 1337 (Fed. Cir. 2006).

[196] *See* 38 U.S.C. § 1154(b); 38 C.F.R. §§ 3.102, 3.304(d) (2017) (Pensions, Bonuses, and Veterans' Relief Regulations).

[197] Clear and unmistakable evidence, commonly called CUE, is the same standard required to rebut the presumption of sound condition. *See* 38 U.S.C. § 1111.

[198] If impossibility is too high a burden for the Secretary, I propose the following alternative: (c) the Secretary proves by a preponderance of the evidence inconsistency between the claimed event, injury, or disease, and surrounding circumstances.

[199] *See* 38 C.F.R. § 3.301.

[200] "VA considers a buddy statement 'credible' if the evidence of record shows the fellow service member served in the same unit and at the same time as the Veteran claims he/she was injured in combat." *M21-1, Part III, Subpart iii, Chapter 2, Section E—Unique Claims and Situations That Require Special Handling*, *supra* note 18.

[201] *Id.*

2. The Statutory Remedy in Action

Like the administrative remedy, the statutory remedy sets out a presumption for service connection in the absence of service medical records. McMullan would likely meet the statutory standard in the same way he would meet the proposed regulatory standard for alternative types of evidence.

Under the proposed statutory framework, the Secretary would then have the opportunity to provide clear and unmistakable evidence to demonstrate the impossibility of McMullan having hypertension in 1978. If the Secretary showed that some intervening condition or event occurred after McMullan's service ended, the Secretary would overcome the presumption. Or if the Secretary proved that McMullan's hypertension was the result of willful misconduct or abuse of alcohol or drugs, the presumption would similarly be defeated. If the Secretary was unable to produce clear and unmistakable evidence to demonstrate the impossibility of McMullan having hypertension in 1978, then McMullan's claim would survive service connection and VA would then rate his disability to determine his benefits.

In McMullan's case, given the impossibility of establishing that his current diagnosis of hypertension dates back to 1978, the Secretary would likely face the same obstacle yet in reverse: the impossibility of proving the veteran did not have hypertension in 1978. Indeed, none of the evidence VA used to evaluate McMullan's claim affirmatively establishes when his hypertension began. Thus, the Secretary would likely not satisfy (B)(i). Furthermore, given that McMullan's file included prison health records acknowledging his hypertension, it is worth considering the hypothetical possibility that if there were also prison records indicating a major health event that caused hypertension during his incarceration,[202] the Secretary could use those records to defeat the presumption of service connection under (B)(ii) by relying on that event as the start of McMullan's hypertension. And finally, there is no evidence of McMullan's willful misconduct generally but there is evidence of drug use in his claims file, specifically prison record notes and McMullan's own statements. That evidence was not used to evaluate service connection, likely because those behaviors had no nexus to

[202] That McMullan was incarcerated is not relevant to whether he had hypertension in 1978 nor whether VA properly evaluated his claim. There is no indication that McMullan experienced any health event during his incarceration that caused his hypertension; the suggestion of that is merely a hypothetical offered to illustrate a way for the Secretary to defeat the presumption in his favor—the Secretary would have the opportunity to uncover any such evidence to refute the service connection.

hypertension. Again, though, if the records indicated willful misconduct that caused or exacerbated hypertension, the Secretary could rely on that evidence to rebut the presumption.

Thus, assuming the Secretary was unable to rebut the service connection on the basis of alternative evidence, VA could then proceed with a disability rating and compensation determination. McMullan would receive a notice of decision including the specific rating and monthly compensation rate. The proposed statutory approach would create a fair and just scheme for cases of lost or destroyed records—especially given the purported non-adversarial system, the debt owed to veterans, and the fact that it is the government, and not the veteran, who is traditionally responsible for safe storage of service medical and personnel records.

CONCLUSION

Creating a presumption for service connection in cases of lost or destroyed records is consistent with Abraham Lincoln's recognition of the debt owed to veterans[203] and the non-adversarial nature of the veterans disability compensation program. Without a presumption of service connection as I have proposed here, McMullan and other veterans will continue to face an insurmountable burden. At best, the burden leads to delayed decisions and benefits. At worst, the burden leads to repeated denial of claims.

In July 2015, McMullan sought assistance through Homeless Persons Representation Project and I agreed to provide pro bono assistance to him. The first step was requesting his claims file, service medical records, and VA's past rating decisions. Months later, I received a CD with McMullan's claims file and rating decisions. No service medical records were included, nor was there any explanation as to their absence.

In response to the September 2014 rating decision denying McMullan's claim on an incomplete record of evidence due to no fault of his own, McMullan timely filed a Notice of Disagreement with the following explanation:

> My claims were incorrectly decided because my missing service treatment records are being used to justify a decision of no service connection. The VA expressly stated it will no longer try to obtain my

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[203] Abraham Lincoln, President, Second Inaugural Address (Mar. 4, 1865), http://www.bartleby.com/124/pres32.html [https:// perma.cc/CN4M-XMM5] ("[L]et us strive . . . to care for him who shall have borne the battle and for his widow and his orphan."); *see also* J. Gary Hickman, *Prologue* to DEP'T OF VETERANS AFFAIRS, M21-1 ADJUDICATION PROCEDURES, Introduction, http://www.benefits.va.gov/WARMS/M21_1.asp [https://perma.cc/5EZS-PGY4].

> records. Without my records, other evidence including buddy and family statements should be used to identify my service-connected hypertension . . . . I have included this evidence in repeated filings with the VA.[204]

To date, VA has not responded. And McMullan continues at parade rest.[205]

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[204] Dep't of Veterans Affairs, Notice of Disagreement (NOD) VA Form 21-0958 § 11A (Aug. 17, 2015) (on file with author). Homeless Persons Representation Project sent the NOD by certified mail on August 18, 2015, and received a return receipt confirming delivery to the Baltimore Regional Office on August 21, 2015. *See* E-mail from Jeff Gold, Dir. of Pro Bono Programs, Homeless Persons Representation Project, to author (Sept. 9, 2015, 9:25 AM EST) (on file with author); E-mail from Emily Ford, Pro Bono Coordinator, Homeless Persons Representation Project, to author (Sept. 22, 2015 1:16 PM EST) (on file with author).

[205] In August 2017, I sent a certified letter to Baltimore VA Regional Office inquiring on the status of McMullan's Notice of Disagreement. Letter from author to Dep't of Veterans Affairs (Aug. 7, 2017) (on file with author). I have confirmation the letter was delivered, but await a response. U.S. Postal Serv., Certified Mail Delivery Confirmation (Aug. 10, 2017 11:07 AM EST) (on file with author).